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No. 98

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

MARYLAND PORT AUTHORITY, BALTIMORE ASSOCIATION OF COMMERCE, DELAWARE RIVER PORT AUTHORITY, THE CITY OF PHILADELPHIA, VIRGINIA STATE PORTS AUTHORITY, AND NORFOLK PORT AND INDUSTRIAL AUTHORITY,
Appellants,

v.

BOSTON AND MAINE RAILROAD, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

REPLY BRIEF FOR APPELLANTS

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I.

REPLY TO THE NEW YORK BRIEFS

The most important fact in this case is that the filing of reduced rates by the northern carriers was promptly met by the filing of matching reductions by the southern carriers. These matching reductions were intended to become effective "simultaneously with those of the respondents" and were clearly stated to be conditional upon approval of

the rates proposed by the northern carriers (R. 3740). The brief of the appellee New York railroads tries to draw attention away from this fact by relegating it to a footnote (Brief of New York Central, et al., p. 8). This is an interesting variant on the conduct of the ostrich who seeks to escape danger by hiding his head in the sand, and is just about as effective.

In a further attempt to avoid the significance of the matching reductions filed by the southern carriers, these appellees point to the Commission's finding that these reductions had not been shown to be just and reasonable and argue that since no appeal was taken from this part of the order, the matching reductions were not before the District Court (New York Central Brief, p. 47). It is true that the Commission did find that the matching rates proposed by the southern carriers were not shown to be just and reasonable, but this finding was admittedly not based on any evaluation of the evidence. Since the Commission had concluded not to approve the rates proposed by the northern carriers, disapproval of the conditional matching rates filed by the southern carriers followed automatically and without regard to the evidence in support of those rates (R. 3753). As a matter of fact, the Commission specifically found that because of the geographical, transportation and cost advantages of the southern carriers "approval of respondents' [the northern carriers] proposed rates would require alternative approval of protestants' [the southern carriers] proposed rates" (R. 3806). As to the failure to appeal to the District Court, since the rates filed by the southern carriers had been conditioned upon approval of the rate reductions proposed by the northern carriers, there was nothing on which the southern carriers could have based such an appeal.

The brief filed on behalf of the State of New York, the Port of New York Authority, the City of New York, et al., similarly seeks to evade the real issue in the case. According to those appellees, "the sole question which is involved in this case, and which the District Court reviewed, is whether the voluntary action of the Northern Tier Railroads in eliminating those differentials was an unlawful exercise of their managerial discretion" (Lefkowitz Brief, p. 7).

The plain fact is that the issue, and the only issue, before the District Court (aside from whether the rates had been shown to be compensatory) was whether the Commission acted irrationally or arbitrarily in refusing to impose an enforced parity on the southern carriers. As Judge FRIENDLY so clearly pointed out in a similar situation, had the Commission approved the equalizing rates filed by the northern carriers and at the same time disapproved the matching rate reductions filed by the southern carriers, this would have been tantamount to saying that parity is "the only lawful relationship." *New York Central Railroad Company v. United States*, 207 F. Supp. 483, 498 (S.D. N.Y. 1962).

Manifestly, there are only two ways that rates can be equalized, by the voluntary concurrence of the carriers or by the Commission's compulsion. In this case the southern carriers did not and do not concur in equalization. They intend to reduce their rates so as to preserve the existing differential unless prevented from doing so, and have manifested this intention by filing matching rate reductions. As the Commission expressly found, and as the proponents openly declared, the sole purpose of the rate reductions proposed by the northern carriers was to equalize the rates of the North Atlantic ports with Baltimore (R. 1616, 3739). Thus, the question of relationship was put squarely before

the Commission, and this was recognized by all parties. Indeed, the northern carriers, in refusing to furnish data as to the cost of handling export-import traffic to and from the port of New York, contended that the reduced rates proposed by them "raised only a question of rate relationships between the North Atlantic ports and required no investigation of the level of those rates" (R. 3752).

The Commission was thus faced with three possible courses of action. It could permit all the proposed rates to become effective, thereby maintaining the existing differential at a lower level. This none of the parties desired, and the Commission found that it would result in a pointless dissipation of badly needed carrier revenues. Alternately, the Commission could permit the proposed reductions of the northern carriers to become effective and cancel the matching reductions of the southern carriers. This would have resulted in an enforced parity against the will of the southern carriers. Or, finally, the Commission could order both sets of rates cancelled, thereby preserving the existing rate structure. This is what the Commission did.

When the most competent of counsel are forced to resort to such feats of legerdemain in order to evade an issue, it may be fairly assumed that they have found no other way to deal with it. And indeed they cannot afford to admit that the real issue here is whether the Commission was required as a matter of law to impose an enforced parity on protesting southern carriers and southern tier ports since the only arguments by which they have attempted to support their position are simply not relevant to this issue. It was in order to empower the Commission to deal with just such situations that Congress amended Section 3 of the Act in 1935 (I.C.C. Brief, pp. 24-45). Moreover, the fact that the Commission was faced with a choice

of prescribing a relationship or permitting a pointless reduction in rates which would have served no purpose except to maintain the existing differential at a lower level, created a situation in which the Commission was fully justified in exercising its power under Section 15(1) of the Act to prescribe rates. That this power exists is admitted at p. 15 of the New York Central brief. It is argued, however, that this "is of no relevance at all here," since the Commission did not purport to exercise this power and could not have exercised it without first finding that the rates were unlawful under Section 3(1). But this is plainly wrong. The Commission did exercise its power to prescribe rates. It expressly found that to permit rates to gravitate to their lowest possible level would result in a "needless dissipation of carrier revenues" and stated that "we have been given *the power to fix rates*, among other reasons, for the purpose of preventing destructive competition and promoting the financial stability of the regulated carriers" (R. 3806). That this power may be exercised by requiring cancellation of proposed rates without first finding the rates forbidden by Section 3(1) is clear and is virtually admitted by the Solicitor General. (See main Brief of Maryland Port Authority, pp. 42-51, Brief for United States, pp. 38-40.)

II.

The Commission's conclusion that the rates proposed by the northern carriers would result in undue prejudice to the southern tier ports in violation of Section 3(1) of the Act was based on a well-supported finding that these rates would cause undue diversion of traffic from those ports to the port of New York, which already holds a monopolistic position. This finding is vehemently assailed in the New York briefs as irrelevant to the real issues in the case. But as the main brief of the appellant railroads demonstrates,

it furnishes a solid base for the Commission's finding that the rates proposed by the northern carriers are unlawful (Brief of Baltimore & Ohio Railroad Company, et al., pp. 24-31).

The contrary argument of the New York Central appears to be based on the assumption that the existing differentials are operating unfairly to the northern tier ports and are unduly diverting traffic to the southern tier ports. But the Commission, after a most exhaustive and scrupulous study of the evidence, reached the contrary conclusion, and that conclusion is amply supported by the record (See main Brief of Maryland Port Authority, et al., pp. 22-36). Superficial arguments based on misleading tonnage statistics afford no answer to the Commission's careful analysis. For example, the statement is made at pp. 6 and 41 of the brief for the New York Central and many times repeated thereafter that the northern carriers now have left only 24% of the export-import traffic between the affected territory and North Atlantic ports as against 76% for the southern carriers. This is highly misleading since those figures have been constructed by adding to the tonnages moved by the southern carriers *approximately one million tons which they moved through the northern tier ports!* (See Appendix F. to Commission's original report, R. p. 3620). Furthermore, the tonnages relied on by the appellees consist primarily of bulk ores and grain, whereas the movement through the northern tier ports is primarily high-rated, high-valued general cargo. It is significant that ore and grain are commodities which are peculiarly subject to diversion to the St. Lawrence Seaway — a diversion which, as is common knowledge, has to a marked degree taken place since the record in this case was closed.

REPLY TO THE BOSTON BRIEF

To the extent that the Boston brief makes the same arguments as those found in the briefs of the New York appellees, no separate reply is necessary. However, Boston strongly emphasizes its lack of ability to compete under the existing rate structure and also places great emphasis on the managerial prerogative of the northern carriers to adjust rates so as to compete for traffic.

If New York could be eliminated from the picture, these arguments might have force, although Boston would still have to contend with other difficulties pointed out in the main brief of the appellant railroads (Brief of Baltimore & Ohio, et al., pp. 41-45). But the Commission has repeatedly ruled that there is no justification for putting Boston on the Baltimore basis unless New York is also to receive the same treatment. While the Commission has in some instances approved or even compelled *equalization* for the benefit of geographically handicapped ports, it has always recognized its lack of power to grant a *differential* to the handicapped port under such circumstances (See main Brief of Maryland Port Authority, et al., pp. 71-73).

REPLY TO BRIEF FOR THE UNITED STATES

The Solicitor General states that "the Commission appeared to rely in part upon an assumption that approval of the reductions proposed by the northern carriers would set off a rate war." He argues, however, that "even if true, this assumption would be irrelevant to a determination whether the proposed reductions would cause undue preference and prejudice" (Brief for United States, p. 20).

It is apparent that the Solicitor General has misunderstood the Commission's holding. He virtually concedes

that where the Commission is faced with the necessity of choosing between prescribing a relationship and permitting needless dissipation of carrier revenues, it may properly disapprove proposed rates even though no violation of Section 3(1) of the Act has been shown (Brief for United States, pp. 38-40). Indeed, he suggests that the case be remanded to the Commission with instructions "to determine whether the evidence supports the finding that the proposed reductions threaten to set off a rate war which would lead to an unnecessary dissipation of carrier revenues, and, if so, to consider whether this finding warrants approval or disapproval of the proposed rates under appropriate sections of the Interstate Commerce Act other than Section 3(1)" (Brief for United States, p. 43).

But no remand is necessary for that purpose since the Commission has expressly found that a rate war has already been started. Moreover, the Commission has found that since "the greater distance of the northern tier ports from the affected territory, and the higher costs of services to and from those ports, are firmly established, * * * approval of respondents' proposed rates would require alternate approval of protestants' proposed rates. This might result in the rates gravitating to their lowest possible level and in a needless dissipation of carrier revenues" (R. 3805-3806).

The Solicitor General argues that these findings are not adequately supported because the Commission did not make "reasonably detailed cost-revenue comparisons on service to each of the ports" and made "no determination of the relationship between the fully distributed costs of any of the carriers and the proposed rates" (Brief for United States, p. 40). But there is not the slightest necessity in this case for the detailed studies and comparisons upon

which the Solicitor General insists and the Commission was amply justified in making the findings on which it based its decision to exercise its power to prescribe rates by requiring maintenance of the existing differentials.

First as to cost of service, the fact that the southern tier ports enjoy domestic rates lower than those of the northern tier ports by a far wider margin than the export-import differentials is certainly indicative of the higher cost of service to and from the northern ports and the testimony in the record presented on behalf of the southern tier ports shows that the cost of service to and from the northern tier ports is indeed much higher (See summary and analysis of this testimony in the brief of appellant railroads, pp. 34-36). The appellees did not dispute this before the Commission. Instead when challenged to show their costs, the New York carriers flatly refused to do so, contending that such evidence would be irrelevant (R. 53). The Boston carriers did introduce cost evidence in an attempt to show that their rates would be compensatory, but made no effort to show costs as low as those of the southern carriers. Finally, the finding of the Commission that the higher costs of service to and from the northern tier ports "are firmly established" has not been challenged either in the District Court or here.

Granted the lower costs of the southern carriers, it is obvious that a rate war could only result in re-establishing the existing differentials at a lower level. Surely it requires no elaborate study of fully-distributed costs to show that such a pointless and futile exercise would result in the dissipation of badly needed carrier revenues. Nobody argues here that the carriers are not in need of revenues — least of all the appellees. They are not proposing to reduce rates for any purpose other than to establish parity.

If they fail in that, their whole case fails. Having made their bed, they must lie in it. *Boston and Maine Railroad v. United States*, 153 F. Supp. 952, 960 (D. Mass. 1957).

CONCLUSION

The judgment of the District Court should be reversed.

Respectfully submitted,

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